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No. 04-417

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BILL HEARD CHEVROLET, INC.-PLANT CITY,
Petitioner,

v.

RANDAL S. BRAGG, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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AMICUS CURIAE BRIEF OF THE FLORIDA AUTOMOBILE DEALERS ASSOCIATION AND THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION IN SUPPORT OF GRANTING WRIT OF CERTIORARI

ROGER SLADE *
MARC E. BRANDES
PATHMAN LEWIS, LLP
One Biscayne Tower, Suite 2400
Two South Biscayne Boulevard
Miami, Florida 33131
(305) 379-2425

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether Courts must look to state law to determine when consummation, for purposes of the Truth In Lending Act, takes place?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Randal Bragg, Robert Crabtree, Christopher E. Nichols, Bond Nichols, Nonie Stebbins, Andre Reichert, Donald E. Stebbins, John E. Cone, Bill Heard Chevrolet, Inc.-Plant City, Affiliated Financial Corporation, Triad Financial Corporation and WFS Financial.

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INTEREST OF *AMICUS CURIAE* [1]

For over 80 years, the Florida Automobile Dealers Association ("FADA") and the National Automobile Dealers Association ("NADA") have been serving automobile dealers by providing counsel on legal and regulatory matters, representing dealer interests in the Florida legislature and in

[1] Pursuant to Rule 37.6, the undersigned counsel authored this brief in whole. No person or entity other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Washington, D.C., developing research data on the automobile industry, and providing training and service programs to improve dealership business operations, sales and service practices. They have a direct interest in this appeal as the dealership practice which is the subject of this Brief, known as spot delivery ("Spot Delivery"), has a substantial economic impact upon both automobile dealerships and their customers such that each state should be permitted to determine when the "consummation" of a credit transaction takes place for Truth in Lending Act purposes.

SUMMARY OF ARGUMENT

The practice of Spot Delivery is utilized by automobile dealers throughout Florida (and nationwide) to provide vehicles to consumers before final credit approval for an automobile sales or lease transaction is provided by a lending institution. Third party lending institutions are necessary because dealers generally cannot, due to financial constraints, provide financing to consumers.

As a result, most dealership transactions involve dealership arranged financing. This financing arrangement is generally considered a three party transaction, and works as follows: (a) the dealership and the consumer negotiate a purchase price; (b) the dealership assesses the consumer's credit worthiness and attempts to determine the credit terms that a third party lender would agree to for that particular transaction; (c) the consumer is presented with a retail installment sales contract ("RISC") that discloses such proposed terms; (d) the consumer executes the RISC and executes documentation that would make the transaction subject to credit approval by a third party; (e) the consumer takes delivery of the vehicle; (f) the dealership forwards the transaction information to one or more intended third party lenders to see if they will purchase the RISC from the dealer based on the stated terms within the RISC; (f) if a lender agrees, the RISC is signed by the dealer, assigned to the lender and the lender pays the

dealer for the assignment; and (g) in those instances where the dealership cannot get a third party lender to purchase the RISC and the credit contingency remains unsatisfied, the deal is rescinded and each party is restored to their original position.

Typically, consumers shop for automobiles on nights and weekends when third party lenders are closed. Often times, third party lending approval takes time. Spot delivery allows consumers to take physical possession of a vehicle before the dealer has been able to secure the approval of that third party lending source.

Spot delivery benefits consumers, automobile dealers and lenders. As discussed below, providing an automobile to consumers before final credit approval is obtained simply makes it much easier for consumers to buy, and for dealers to sell, an automobile. The overwhelming majority of automobile purchases in the United States today take place because automobile dealers are able to successfully obtain financing for consumers. Moreover, a significant percentage of these transactions utilize the spot delivery practice. In these circumstances, consumers and automobile dealers have a common goal—a consumer wants to purchase and obtain immediate possession of an automobile while the dealer wants to sell and deliver the automobile to the consumer. Providing consumers with possession of a vehicle pending final credit approval eases this process for all concerned and has been approved by numerous Federal Courts and state legislatures throughout the land. The spot delivery practice is a factor in this case because the issue of when consummation takes place is primarily important to spot delivery transactions; especially those where third party lending approval is not forthcoming and the transaction must be rescinded. Any decision which could be interpreted to impact this long-standing practice would slow commerce and convenience in the automobile sales and leasing industries.

Bragg improperly concluded that Federal law determines when an automobile sales transaction is "consummated" for Truth in Lending Act purposes. It is the time of consummation which dictates when Federally mandated Truth in Lending Act Disclosures must be provided to consumers. The Federal Reserve Board has historically determined that the question of when an automobile sales transaction is "consummated" for Truth in Lending Act purposes should be left to state law.

The Bragg Court's determination that a transaction is "consummated" upon the execution of a Retail Installment Sales Contract by the consumer not only may impede the spot delivery practice, it essentially federalized state contract law by creating an inappropriate Federal standard of when consummation takes place. As discussed below, this issue should have been left by the *Bragg* Court to the states in accordance with the Federal Reserve Board's commentary.

ARGUMENT

I. THE 11TH CIRCUIT COURT OF APPEALS IGNORED THE FEDERAL RESERVE BOARD'S OFFICIAL STAFF COMMENTARY AND STATE LAW WHEN IT HELD THAT A RETAIL INSTALLMENT SALES CONTRACT IS CONSUMMATED WHEN A CUSTOMER SIGNS IT RATHER THAN WHEN FINANCING IS APPROVED BY A LENDING INSTITUTION.

In a Spot Delivery transaction, the buyer takes possession of the vehicle pursuant to financing terms proposed by the dealer which have been agreed upon by the consumer. Consumers have the time to shop for credit terms prior to the time that they sign a RISC. Typically, dealers arrange for financing but do not serve as the actual funding source electing instead to assign the RISC to a lending institution which has approved the consumer for financing. In the event that

financing terms cannot be finalized on the terms initially proposed by the dealer, a consumer is free to walk away from the proposed transaction or agree to a different set of financing terms subsequently approved by a lending institution. In the event that a consumer agrees to the new financing terms, these terms are set out in a new RISC containing all Federally mandated Truth in Lending Act disclosures which are provided to the consumer before the consumer signs the RISC. Normally, a consumer is not obligated to purchase the vehicle on the terms set forth in the RISC unless a lending institution agrees to those terms. A spot delivery sale is used to allow the buyer to take possession of the car before the financing terms are finalized. *See Rucker v. Sheehy Alexandria, Inc.*, 228 F.Supp.2d 711, 713 n.1 (E.D. Va. 2002).

In recent years, spot deliveries have become the norm (although with the internet, pre-approval of credit terms is becoming increasingly popular). The Florida Legislature has approved the concept of spot delivery in enacting F.S. §§ 319.001(8) and 320.60(10), which approves the practice. *See* F.S. §§ 319.001(8) and 320.60(10) (defining differences between "new" and "used" vehicles in recognition that, in certain, limited instances, spot deliveries require a consumer to return a vehicle to the dealership when financing cannot be approved by a lending institution).

The 11th Circuit's decision in *Bragg*, if misconstrued, creates a risk that Spot Delivery will be interpreted as being violative of the Truth in Lending Act. More specifically, before the ink of the *Bragg* decision was dry, attorneys began to cite *Bragg* for the proposition that a RISC, once consummated by virtue of the consumer's signature, was unavoidable and could not be subject to a financing contingency (such as the Bailment Agreement for Vehicle Spot Delivery in the instant action). More importantly, this same theory supports the notion that once consummated (by virtue of the con-

sumer's signature), the dealer is bound to the transaction without regard to whether the dealer assented to those terms and/or signed the RISC and therefore purports to nullify the stated and agreed condition precedent to the RISC.[2] However, these express conditions must be given effect. If not, the economic consequences to automobile dealers could be substantial as dealers (subject to an occasional exception) do not act as the source of funds in automobile sales and lease transactions. Accordingly, automobile sales would suddenly require prior credit approval.

Sometimes lending institutions are able to provide rapid credit approval. This typically occurs for consumers who have very good credit. For consumers whose credit is less than perfect, lenders typically take longer to evaluate a consumer's credit and perform greater background investigation and due diligence. If Spot Delivery were to be interpreted as being violative of TILA, based upon *Bragg*, consumers with poor credit ratings will be the ones who suffer since those consumers will have to wait longer to take possession of a vehicle while third party lenders complete their due diligence. This will require consumers to make multiple trips to the dealership before obtaining possession of a vehicle. Such a

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[2] Consider the following example. A consumer visits a dealership the day after a promotional zero percent interest expires, and presents a compelling basis to get the promotional interest rate. The dealer offers to attempt to get that promotional interest rate and has the consumer sign a RISC with such terms. Clearly, the dealer has not agreed to those terms; yet *Bragg* indicates the transaction was consummated. Either *Bragg* serves to destroy elementary notions of contract law taught in law school that requires a meeting of the minds on all material terms of a contract, or purports to create a parallel consummation analysis under TILA which suddenly obviates a meeting of the minds analysis and requires, instead, only the signature of the consumer before the dealership is bound to the terms of the RISC. The absurdity of this construction is further highlighted when the Court considers the fact that dealerships merely arrange for financing and are not really the funding source.

restriction would actually harm consumers since it would impede their ability to purchase automobiles on nights and weekends when, typically, most individuals are comfortably able to shop for automobiles.

The excuse for this attack on spot delivery practices by consumer lawyers is a direct result of the 11th Circuit decision in *Bragg* to ignore the unambiguous commentary of the Federal Reserve Board which interprets the Truth in Lending Act's definition of "consummation". The Federal Reserve Board indicates that "consummation" of a credit transaction occurs when a consumer becomes "contractually obligated on a credit transaction." *Zoumayaiwan v. Jack Haggerty Olds, Inc.*, 1985 WL 1453 (N.D. Ill.). The Federal Courts have interpreted this phrase in accordance with state law. *Nash v. Financial Savings and Loan Association*, 703 F.2d 233 (7th Cir. 1983). Only when a consumer is approved for financing is when TILA's disclosure requirements are (and should be) triggered.

Now, under *Bragg*, there is a potential argument that TILA requirements will be triggered simply upon the consumer's execution of a RISC containing proposed credit terms. These disclosure requirements will have the natural impact of limiting Spot Delivery sales thereby impeding the free flow of commerce between consumers and dealers and making the process a lot more difficult for consumers who come to dealers seeking assistance with financing.

TILA requires that the RISC provide accurate disclosures of credit terms to consumers before "credit is extended" or before "consummation of the transaction" takes place 15 U.S.C. Sec. 1638(b)(1); 12 C.F.R. Sec. 226.17(b). TILA liability cannot accrue until a credit transaction is "consummated". *Baxter v. Sparks Oldsmobile, Inc.*, 579 F.2d 863, 864 (4th Cir. 1978). Consummation is defined as the time "the consumer becomes obligated on a credit transaction." 12 C.F.R. 226.2(a)(13). The determination of whether or when a

party becomes contractually obligated is a question of state law. Official Staff Commentary Sec 226.2(a)(13).

The Retail Purchase Contract signed by Bragg provides:

> the execution of this agreement to purchase is an expression of good faith and contractual obligation on the part of the seller as well the purchaser, in that the seller agrees to sell the designated vehicle only under the terms and conditions herein set forth, and agreed to by the purchaser, provided however, the designated financial institution approves purchaser's application for a loan equal to the amount of a note to be executed by the purchaser * * * in the event this is a sale on credit, neither party hereto shall be bound until terms of credit have been approved by both parties.

Similarly, the Bailment Agreement for Vehicle Spot Delivery signed by Bragg provides in relevant part that "pending credit approval by lending institution and completion of sales transaction. . . delivery of said vehicle by dealer is hereby made to buyer(s) as a convenience to buyer(s), and is subject to all terms and conditions in said sales agreement, if any, executed concurrently or in accordance therewith. . . said vehicle shall remain the property of the dealer."

Under Florida law, a condition precedent is defined as one which calls for the performance of some act or happening of some event after a contract is entered into, and upon the performance or happening of which its obligation is made to depend. *FDIC v. Coleman*, 611 So.2d 1300, 1302 (Fla. 3d DCA 1993); *Cohen v. Rothman*, 127 So.2d 143, 147 (Fla. 3d DCA 1961). Since the text of Bragg's contract made the sale conditioned upon financing approval by a third party lender, the transaction was not consummated until the satisfaction of the condition precedent (i.e., third party lending approval). Because the contracts about which Bragg complained were

never funded by a lending institution, the credit transactions were never consummated under Florida state law.

As a matter of public policy, the determination of when consummation occurs for TILA purposes should be left to the individual states as the Federal Reserve originally contemplated. Not only does *Bragg* purport to apply a Federal standard to the definition of "consummation", the *Bragg* Court actually applies the wrong standard. There is nothing in Federal law that provides that "consummation" of a consumer credit transaction occurs for TILA purposes as soon as a customer signs a RISC as the *Bragg* Court seems to suggest. Instead, the Federal Reserve wisely chose to leave this issue to the states since, when a party becomes obligated on a contract, is almost always determined by state law. *See*, e.g., *Nash,* 728 F.2d at 720. *Bragg* purports to federalize this important area of contract law under the guise of interpreting TILA. This Court should reject that approach.

TILA was designed to regulate the disclosure of credit terms to consumers, not to Federalize contract law. In the *Bragg* context, Florida law amply covered the issue of when a consumer becomes contractually obligated on a credit transaction on the occurrence of an event. *See*, e.g, *Huskamp Motor Co. v. Hebden*, 104 So.2d 96 (Fla. 3d DCA 1958); *777 Flagler Co. v. Amerifirst Bank*, 559 So.2d 1210 (Fla. 4th DCA 1990). A Federal Court does not have the authority to Federalize the issue of when two private parties to a contract become contractually obligated. *See* e.g., *Najieb v. Chrysler-Plymouth*, 2002 WL 31906466 (N.D.Ill. 2002); and *Baxter v. Sparks Oldsmobile, Inc.*579 F.2d 863, 864 (4th Cir. 1978).

Prior to 1982, Regulation Z had defined "consummation" as the time when a creditor agrees to extend credit and the customer agrees to utilize that credit. 12 C.F.R. § 226.2 (kk) (1982); *Nash v. Financial Savings and Loan Association*, 703 F.2d 233, 238 (7th Cir. 1983). In 1982, Regulation Z redefined "consummation" resulting in a "significant departure"

from the previous definition, because under the previous definition, courts were to look at the point in time that the consumer first suffered economic coercion to obtain financeing. *Zoumayaiwan v. Jack Haggerty Olds, Inc.*, 1985 WL 1453 (N.D. Ill.). Under the new, revised definition, this coercion is omitted, and focuses consummation to the point in time that the consumer becomes contractually obligated on the credit transaction. Thus, the duty to disclose does not arise at the time of the underlying purchase; rather, the creditor need disclose only before the consumer is contractually obligated on the credit transaction. *Id*; *46 Fed Reg. 20851 (April 7, 1981).* Courts are to look at state law to determine the point in time that the consumer became contractually obligated. *Id.*

While the 11th Circuit recognized the revised Regulation Z, it did not recognize that it was relying on case law interpreting the outdated version. It found that:

> Regulation Z also provides that, when determining the point at which a consumer becomes contractually obligated to a credit agreement, state law should govern. 12 C.F.R. § 226, Official Staff Commentary 2(a)(13). However, "although state law is determinative of when a contractual relationship is created, it has nothing whatsoever to do with how the transaction in to be characterized for [TILA] purposes"; that question is governed by federal law. *Cody*, 606 F.2d at 505.

Bragg at 1065-1066.

The 11th Circuit's reliance on *Cody* is misplaced. The 11th Circuit did not recognize that *Cody* was decided before the 1982 changes to Regulation Z and before the Official Staff Commentary which require that courts look to state law to determine the point in time that a consumer becomes contractually obligated.

Unfortunately, the *Bragg* decision has already been used for the notion that the spot delivery practice allegedly

becomes unlawful upon the consumer's execution of the RISC. This is the result of a strained conclusion drawn from *Bragg*'s reliance on *Cody*, where *Bragg* found that:

> Given the strong remedial purpose of TILA and continual admonitions that we construe TILA and Regulation Z liberally in the consumer's favor, *see, e.g Cody*, 606 F.2d at 505, we cannot accept the district court's interpretation of Regulation Z, as it would undermine the ability of prospective consumers of credit to weigh competing offers.

Bragg at 1067.

This analysis is flawed. Spot delivery does not run afoul of the often stated purpose of TILA to permit consumers to shop around for credit terms before consummation. Notwithstanding the *Bragg* decision's interpretation of "consummation", a prospective consumer has every opportunity to weigh competing offers before the consumer signs the RISC. Once a consumer receives a proposed RISC from a dealer, a consumer is not obligated to sign the RISC at that moment. Rather, a consumer is free to take the RISC, with all of the proposed credit terms disclosed on it, to another dealer or to a third party lender to compare prices. Therefore, for practical purposes, TILA disclosures are made before the consumer executes the RISC as the disclosures are contained within the RISC itself. Moreover, should the RISC be rescinded by virtue of the inability to satisfy the financing contingency, and should the buyer and the dealer negotiate different terms (presumably terms that will pass lender scrutiny), the buyer can again, prior to executing the second RISC, take those credit terms to another lender to obtain competitive pricing. This comports with the purpose of TILA which is to promote the informed use of credit by consumers. Simply put, the spot delivery practice does not violate TILA. *Janikowski v. Lynch Ford, Inc.*, 210 F.3d 765, 769 (7th Cir. 2000).

CONCLUSION

Spot Delivery is a great benefit to consumers because it allows them to take immediate delivery of a vehicle, often on a weekend or other time outside of normal banking hours. To protect themselves, dealers lawfully enter into bailment agreements with customers to require the return of the vehicle if the proposed financing terms cannot be finalized.

The Appellate Court's ruling is in direct contradiction to the Staff Commentary of Regulation Z. The Petitioner's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROGER SLADE *
MARC E. BRANDES
PATHMAN LEWIS, LLP
One Biscayne Tower, Suite 2400
Two South Biscayne Boulevard
Miami, Florida 33131
(305) 379-2425

* Counsel of Record